Supreme Court, U.S.
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No. 98-1781

IN THE
Supreme Court of the United States

ALLIANZ LIFE INSURANCE COMPANY
OF NORTH AMERICA,
Petitioner,

v.

DEBRA BARTGIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Nevada Supreme Court reasonably declined to apply federal due process standards to a $3.75 million punitive damages award arising out of insurance fraud and bad faith where no federal question was raised until a reply memorandum filed in support of a motion for judgment NOV and where the state law standards were manifestly more protective of the insurance company's interests than the federal constitutional requirements stated in this Court's decisions, particularly *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993).

RULE 29.6 STATEMENT

Respondent is an individual and thus has no disclosure to make pursuant to Rule 29.6 of the Rules of this Court.

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It is impossible to fathom how petitioner can construct an argument that the punitive award in this case violates the Due Process Clause of the Fourteenth Amendment without even citing, much less attempting to distinguish, this Court's decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993). Given the jury's findings, which are uncontested now, that petitioner engaged in "bad faith" and "fraudulent" efforts to "conceal" a bizarre reimbursement restriction in its insurance policy, this case presents facts that are, if anything, appreciably worse than those in *TXO*. See *TXO*, 509 U.S. at 472 (Scalia, J., concurring). This is not conduct that is lawful in any state, let alone in most states, which was what caused the Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585-86 (1996), to set aside the punitive award in that case. In stark contrast, this case in-

volves knowing and intentional wrongdoing that caused significant emotional and even physical harm to the plaintiff. These are the classic justifications for a substantial punitive damage award.

No doubt recognizing the manifest weakness of its due process argument, petitioner seizes upon a strikingly ambiguous footnote in the Nevada Supreme Court's opinion as the foundation for an argument that Nevada is engaged in "civil disobedience" because it failed to pay heed to this Court's pronouncement in *BMW*. That is silly. The best interpretation of the footnote is that it reflects the Nevada Supreme Court's determination that petitioner had not adequately preserved a federal constitutional challenge because it was not raised in a timely fashion in the trial court. Moreover, the Nevada Supreme Court's reliance on state law, rather than federal constitutional law, saved petitioner $3.75 million because the punitive damage award of the jury, which was reduced by that amount by the Nevada Supreme Court, was fully consistent with federal constitutional standards embodied in *TXO* and *BMW*. In sum, there is no significant legal issue presented by the decision below, and accordingly, the petition for certiorari should be denied.

STATEMENT

This case arises out of gross insurance fraud and bad faith that caused the individual plaintiff significant personal injuries that warranted a $283,757.75 compensatory award. That compensatory award is uncontested in this Court. Moreover, if petitioner's scheme were left unchallenged, petitioner stood to net significant financial gain. In addition, petitioner's description of its conduct that caused respondent's damage does not adequately convey the appalling nature of its actions. Properly understood, there is no serious constitutional issue presented in this case.

1. Respondent is a 46-year-old court reporter who owns her own freelance court reporter partnership in Reno, Nevada. Because she is self-employed, respondent obtained her own health insurance benefits. As a member of the National Shorthand Reporters Association ("NSRA"),[1] she purchased a policy through the Association in the early 1980s and maintained it continuously at all times relevant to this case.

The broker for this policy was Albert H. Wohlers & Co. ("Wohlers"), which was a co-defendant in the state court proceedings and is a nominal respondent in this Court. According to the petition, Wohlers now intends to pay its portion of the judgment and will not seek further review by this Court. Pet. 9 n.5. In 1990, the predecessor to petitioner Allianz Life Insurance Company of North America became the underwriter for the NSRA's health insurance policy. Pet. App. 4a.

The courts below found that Wohlers and petitioner fraudulently induced the court reporters to purchase group health insurance to replace the then-existing policy, which was underwritten by a different company. They affirmatively and falsely represented to the insureds that the replacement policy provided "comparable benefits" to those offered in the pre-existing policy. They also falsely represented that the policy constituted "comprehensive major medical insurance." In identifying a list of significant differences between the existing and the new policy, no mention was made of any significant restrictions on hospital coverage. Based on these representations and re-

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[1] The NSRA changed its name to the National Court Reporters Association sometime after respondent purchased her insurance. The lower courts and petitioner have referred to the Association by its previous acronym. Accordingly, to avoid confusion, we will do the same.

spondent's own review of the policy, she agreed to the replacement plan. *Id.* at 5a-6a.

Contrary to the representations made by petitioner and Wohlers, there was never any intention on their part to provide "comparable benefits" and this was not a "comprehensive medical plan." Instead, petitioner severely limited the hospitalization benefits by fraudulently inserting an obscure "anciilary charges" provision into the policy, which shielded petitioner from the most costly hospital coverage claims. Even the adjuster who handled respondent's claim described the provision as "goofy." III RT 792.

The "ancillary charges" provision, as applied, limited coverage in the event a patient remained in a hospital setting for 24 hours or more. Hospital stays of up to 24 hours were treated like ordinary medical expenses and reimbursed. But, if the patient were to stay in the room for any period beyond 24 hours, then the peculiar "ancillary charges" provision in the policy was triggered and petitioner would be responsible for paying essentially for room and board. In this case, that amounted to approximately 11 percent of the total hospital bills. Thus, for respondent's hysterectomy, the "ancillary" components of the operation included: the operating room, the recovery room, staplers and additional sutures, a cardiac monitor and basic anesthesia. *Id.* at 8a. The non-"ancillary" components of respondent's medical care were room and board. *Id.*

2. In 1991, respondent was diagnosed with precancerous cells in her reproductive organs and underwent a biopsy to have the cells removed. Petitioner paid for 80 percent of the half-day hospital stay. Later in 1990, petitioner was hospitalized again for an emergency and 50 percent of those costs were paid by petitioner pursuant

to the terms of the insurance contract dealing with emergency room visits. Pet. App. 6a.

In 1992, respondent's physician recommended a hysterectomy to relieve her of the serious discomfort she was experiencing. Because the procedure was deemed to be "elective," respondent was required to pay an additional $200 and to have the procedure pre-certified. She did this and the surgery was performed on December 29, 1992. The procedure was successful, but respondent was hospitalized for 27 hours, including check-in and check-out time. *Id.* at 7a.

Respondent submitted her hospital bills for payment, fully expecting to pay $200 extra for an elective procedure and a charge for exceeding the 24-hour, pre-certified period of hospitalization. *Id.* Instead of agreeing to pay essentially the promised 80 percent of the hospital costs, petitioner lumped the vast majority of the charges into a single item—$9328.75—styled "ancillary charges" and then paid only $930 of that amount. *Id.* at 7a.

Having been told that anaesthesia and an operating room are merely "ancillary" to a hysterectomy, respondent "became extremely upset." *Id.* at 8a. During a six-month period, respondent unsuccessfully sought reimbursement on the same terms she had been reimbursed for her earlier hospital stay, but without success. Throughout this period respondent became more distressed, causing her to "los[e] sleep and her appetite." She also "developed two bladder infections and an upper-respiratory infection, suffered dramatic weight loss, and felt 'generally terrible.'" *Id.* at 9a.

3. On July 15, 1993, respondent filed this lawsuit against Wohlers and petitioner in the Second Judicial District Court of Nevada, alleging breach of contract, fraud, bad faith and violations of the Nevada Unfair Practices

Act. Respondent sought both compensatory and punitive damages. The jury returned a verdict in respondent's favor in which it awarded $8,757.75 in contract damages, $275,000 in non-economic compensatory damages, and $500,000 and $7,500,000 in punitive damages against Wohlers and petitioner, respectfully.

Petitioner filed a post-trial motion for a judgment NOV challenging virtually every aspect of the jury's verdict. Specifically, petitioner argued that the award of punitive damages was excessive. In making this argument, however, petitioner pointedly relied upon Nevada law.[2] At no point in that argument did petitioner refer to the federal constitution, due process or any opinion of this Court dealing with punitive damages. See Resp. App. 5a ("*Under Nevada law,* punitive damages are required to be an amount suitable to punish or deter; to bear some reasonable relationship to the actual damages and to bear a relationship to the blameworthiness of the alleged wrongdoing") (emphasis added).[3]

The trial court denied the motion. Pet. App. 31a-49a. In addressing punitive damages, the trial court applied "the standard for evaluating excessiveness of punitive damages in Nevada." *Id.* at 43a (quoting at length from *Ace Truck and Equipment Rentals, Inc.* v. *Kahn*, 746 P.2d 132, 186-87 (Nev. 1987). The trial court concluded that "[t]he award reflects the jury's view of the reprehensibility

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[2] Defendants Allianz and Wohlers' Memorandum in Support of their Motions for Judgment Notwithstanding the Verdict, for a New Trial and/or to Alter or Amend the Judgment at 43-51. See Resp. App. 1a-8a.

[3] It was not until petitioner's reply memorandum that any mention is made of the Due Process Clause. Moreover, other than asserting that the award violates the standards of the Fourteenth Amendment, petitioner did very little to construct an argument separate from the Nevada law argument.

of Defendants' conduct, and the amount they felt was necessary to deter similar future conduct." *Id.* at 45a. Accordingly, the court denied the motion for remittitur. *Id.*

4. With respect to the only portions of the decision below that are relevant to the petition, the Nevada Supreme Court unanimously affirmed liability for bad faith and fraud and reduced the size of the punitive damages award. Pet. App. 1a-30a. The court found "preposterous" the argument by petitioner that its fraudulent conduct could "insulate it from bad faith liability and vice versa" (*id.* at 10a n.2), and otherwise held that there was ample evidence to prove petitioner's liability for fraud and bad faith breach of contract.

With regard to punitive damages, petitioner renewed before the state supreme court its state law arguments on excessiveness, but added a significantly expanded argument based on the Due Process Clause. Respondent argued in her brief that petitioner "waived any assertion that the award of punitive damages violates due process of law" because the issue had not been raised until a reply memorandum on post-trial motions in the trial court. Respondent's Answering Brief at 97-99.

The Nevada Supreme Court reduced the punitive award against petitioner from $7.5 million to $3.75 million. In doing so, the court noted: "We hold that the jury's assessment of punitive damages is excessive solely as a matter of state law." Pet. App. 24a n.7. The court went on: "Thus, we do not consider [petitioner's] argument, premised on *BMW* . . . that the punitive damages awarded in this case are grossly excessive pursuant to the Fourteenth Amendment of the Federal Constitution." *Id.*

The Nevada Supreme Court's analysis of excessiveness under state law bore a striking resemblance to the analysis

outlined by this Court in *BMW*. The state court considered whether the award was disproportionate to the degree of blameworthiness or harmfulness of petitioner's conduct and whether the size of the award was reasonably necessary to punish the offender and to deter others from similar conduct. *Id.* at 25a. Under these standards, the punitive award against petitioner was cut in half in large part because petitioner offered to settle by agreeing "to pay the full amount of respondent's claim" and her attorney's fees. *Id.* at 26a. Of course, that offer, which only came *after* petitioner was caught red-handed, was contingent upon respondent agreeing to release petitioner from all other claims she might have, including her non-economic damages.

REASONS FOR DENYING THE PETITION

Petitioner's basic argument is that the 3.75 million dollar punitive award should have been reviewed under the standards enunciated by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and that under those standards the award would be deemed excessive. That simply is wrong. Under this Court's punitive damages cases, including *TXO*, which petitioner completely ignores, the original $7 million punitive damage award would have been constitutional. In any event, this case involves no conflicts with decisions of any other state courts or federal courts of appeals, and the proper application of *BMW* and *TXO* to the specific facts of this case is not an issue that remotely warrants review by this Court.

Petitioner recognizes as much and therefore attempts to dress up this case by employing extraordinary hyperbole. It asserts that the Nevada Supreme Court's failure explicitly to address *BMW* constitutes an act of judicial civil disobedience that attacks "one of the cornerstones of our constitutional system." Pet. 1. There is a simpler and

far less pernicious explanation for the unanimous court's refusal to entertain petitioner's federal constitutional claim, *viz.*, it was not timely raised in this litigation. Moreover, given that petitioner received far more relief under state law than it was entitled to receive as a federal constitutional matter, the issue is irrelevant and certainly not worthy of certiorari.

1. Petitioner first argues (Pet. 10-12) that the failure to apply *BMW* by name to this case violates the Supremacy Clause. This is a patently silly effort to elevate a somewhat ambiguous footnote into the worst case of judicial disobedience since the desegregation era of the 1950s. The far more logical explanation for the footnote is that the Nevada Supreme Court either concluded that petitioner's tactical choice not to mention any federal constitutional issues in this litigation prior to a reply memorandum in support of a judgment NOV was simply too late or, alternatively, that the standards of the Due Process Clause offer no greater protection in this context than state law does. Either way, the matter certainly does not warrant this Court's attention.[4]

Certainly, there is nothing in the Nevada Supreme Court's unanimous decision that remotely indicates that it does not feel bound by the Due Process Clause or by this Court's pronouncements. It would be remarkable for the

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[4] Petitioner recognizes that its contrived portrayal of the Nevada Supreme Court's actions as utterly lawless is strained. Thus, petitioner attempts (Pet. 17-19) to make the problem appear acute by arguing that it is symptomatic of a broader refusal by state courts to comply with the Supremacy Clause. If those cases in fact involved deliberate refusals to entertain federal constitutional issues that were properly preserved and had independent significance, then the proper solution would be to review those decisions. The actions of the Mississippi and New Mexico Supreme Courts, which were never considered by the Nevada Supreme Court, much less relied upon by it, provide no basis for review of this case.

Court to assume such disregard of our constitutional structure when there is a readily available, less pernicious explanation available. This is not a case like *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983), and its progeny, where the lower court has issued a provocative constitutional ruling without addressing the source of law involved. In that situation the Court rightly assumes that the federal constitution is being invoked rather than leave the issue in doubt. Here, the Court should not assume bad faith by a state supreme court absent some clear evidence to support such a judgment. There is no such evidence; to the contrary, waiver and superfluity provide completely benign explanations for the decision below and thus undermine petitioner's effort to make a mountain out of this mole hill.[5]

2. Petitioner's final argument is that the $3.75 million punitive damage award would not withstand scrutiny under *BMW*. First, the proper application of one of this Court's decisions hardly presents an issue worthy of certiorari. Petitioner does not even argue that the decision below conflicts with any decisions of any other state courts or federal courts of appeals or that the proper under-

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[5] The suggestion (Pet. 10 n.6) that petitioner was not on "notice" that failure to raise a constitutional issue at some point in this litigation prior to its reply memorandum in support of a motion for a judgment NOV is astonishing. Nevada's rules of civil procedure, like every other state's, require timely assertion of legal issues. *See* Nev. R. Civ. P. 7(b). As this Court recognized in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 7 (1991), the failure to provide particularized jury instructions on the due process issue is a sufficient basis not to entertain a particular claim. The failure to raise such issues in petitioner's post-trial motions flatly undercuts any suggestion that petitioner's due process arguments were not forfeited. *See Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77 (1988) ("vague appeal to constitutional principles does not preserve . . . due process claim").

standing of *BMW* is an issue of any general or recurring significance.

Second, even if the proper application of this Court's decisions in a particular context was otherwise arguably worthy of attention, petitioner's argument is completely inadequate. It does not even cite, much less discuss, this Court's much more directly relevant decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993). Thus, if the Nevada Supreme Court had decided this case solely on federal constitutional grounds, not only would the $3.75 million award have been upheld, but the jury's $7 million award also would have satisfied the requirements of the Fourteenth Amendment. In any event, there certainly is no serious question that the smaller award upheld by the state supreme court below is constitutional.

Petitioner treats the proper constittutional analysis as if this issue first arose in 1996 when *BMW* was decided. But that decision did not purport to overrule *TXO* and it clearly did not do so. Thus, the proper analysis here is at a minimum more complicated than the simple three-factor approach that petitioner explicates in three pages.

At the outset petitioner must accept the fact that its conduct here was appreciably more "reprehensible" than that involved in either *BMW* or *TXO*. In *BMW* the refusal to disclose to dealers the costs of relatively trivial pre-delivery repairs was not even tortious in most states. Thus, in stark contrast to *BMW* "the record in this case discloses . . . deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." 517 U.S. at 579. Petitioner's complaint (Pet. 14) that the award here is 13 times the compensatory award does not

remotely approach the multiple of 526 times the compensatory award this Court sustained in *TXO*.[6]

Petitioner places great emphasis (Pet. 13) on the Nevada Supreme Court's willingness to hold its nose and label petitioner's conduct as "not highly reprehensible." To be sure, that court gave petitioner the benefit of the doubt based on the dubious offer to pay the amount of respondent's insurance claim after defrauding respondent and inflicting serious emotional harm on her. See p. 8, *supra*. But that judicial act of leniency merely reveals the substantial benefit petitioner recovered from the application of state law standards in this case.

Petitioner also asserts (Pet. 13) that the punitive award does not "bear a reasonable relationship to the actual harm" caused by its conduct. Petitioner can only make this argument with a straight face by ignoring *TXO*. In that case the defendant engaged in "slander of title" that caused $19,000 in economic harm. Here, petitioner engaged in fraudulent and bad faith conduct that caused more than $280,000 in damages.[7] Based strictly on repre-

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[6] Recognizing the weakness in any effort to attack the proportionality of the punitive award compared to the conduct of petitioner as found by the jury and the Nevada courts, petitioner proposes to retry the case before this Court. Thus, petitioner urges (Pet. 13 n.9) that Wohlers is responsible for all of the misdeeds. Of course, even petitioner concedes that nothing was sent out to policyholders without its review (*id.*) and the jury was certainly entitled to conclude on this record that the insurance company acted maliciously in the way that it described its insurance policy and the way that it concealed its interpretation of the "ancillary charge" provision. *See* pp. 3-4, *supra*. Moreover, given Wohler's financial incentives provided by petitioner not to pay claims and to increase the number of insureds, all of Wohlers actions are directly petitioner's responsibility. II RT 440.

[7] At points in the petition, petitioner focuses (Pet. i) on the actual economic damages as opposed to the non-economic damages. This effort is obviously misguided. The notion that a health in-

hensibility and proportionality, the State easily could have imposed a much harsher penalty than $10 million on petitioner's misconduct and still have satisfied due process under *TXO*.

Finally, petitioner (Pet. 14) compares state law civil and criminal penalties for misconduct by an insurance company as a limit on the proper punitive damages award. This analysis is flawed both as a matter of federal and state law. First, this comparison has never been regarded as a dispositive basis for overriding punitive-damage awards granted under state law. See, *e.g.*, *TXO*, 509 U.S. at 456; *Haslip*, 499 U.S. at 23. But more fundamentally, petitioner conveniently identifies a series of state sanctions that it labels as "comparable." For petitioner's misconduct, it is not at all clear that the "comparable" provision is not Nev. Rev. Stat. § 205.380(1)(a), which criminalizes obtaining money by false pretenses and carries a fine of $10,000 and a prison sentence of up to six years. See *Haslip*, 499 U.S. at 23. Moreover, even the provisions cited by petitioner contain an exception for "bad faith" actions by an insurance company. See Nev. Rev. Stat. § 42.005(2)(b); Pet. App. 24a (discussing the exception).[8]

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surance company could engage in fraudulent and bad faith conduct to deny significant coverage to someone who has just experienced a serious medical treatment, such as a hysterectomy, and not expect to be required to compensate for emotional injuries is absurd. Petitioner is, if anything, fortunate that respondent's physical maladies arising out of her mistreatment by petitioner were not more serious. In any event, the $275,000 award unquestionably should be considered in determining whether the punitive award was reasonably proportionate to the harm caused by petitioner. *See BMW*, 517 U.S. at 580 (comparison to "actual harm inflicted").

[8] Remarkably, petitioner attempts to resurrect (Pet. 15 n.10) its "preposterous" argument based solely on state law that it cannot have acted in "'bad faith" if it was found to have engaged in "fraud." Pet. App. 10a n.2. There is nothing remotely inconsistent

In sum, even accepting petitioner's strikingly narrow due process analysis, it is plain that the "indicia" identified in *BMW* point squarely in favor of a punitive award much larger than the one ultimately approved by the Nevada courts in this case. Once the *BMW* blinders are removed and the case is examined in light of *TXO* and on the basis of petitioner's malicious and physically harmful conduct, then the suggestion that a serious due process question is posed here melts away. Certainly, nothing in the application of these existing precedents to the facts of this particular dispute raises any issue worthy of further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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between a finding that an insurer misrepresented the nature of its coverage in inducing a policyholder to purchase the policy and a finding that the insurer later relied in bad faith upon a bogus "ancillary charges" provision as the basis for implementing the fraud. At a minimum this state law issue cannot cast any doubt on the validity of a significant punitive award in this case. No matter what, petitioner's conduct was reprehensible and the punitive damages bear a completely reasonable relationship to the compensatory award.